Supreme Court, U.S.
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No. 09-_____

In The

Supreme Court of the United States

LINDA LEWIS, as mother and personal representative of the estate of her son, Donald George Lewis,

Petitioner,

v.

CITY OF WEST PALM BEACH, FLORIDA; RAYMOND SHAW, ROBERT LEROY ROOT, III, RANDALL MAALE, THELTON LUKE, and AUDREY DUNN, Police Officers for the City of West Palm Beach Police Department, in their individual capacities,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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October 5, 2009

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QUESTIONS PRESENTED FOR REVIEW

Whether police officers effecting a non-criminal detention of a mentally disturbed person by applying a "hog-tie," binding his wrists and ankles to each other behind his back as he is pinned to the ground with pressure on his neck, after which he died, are entitled to qualified immunity.

Whether the Eleventh Circuit violated *Hope v. Pelzer*, 536 U.S. 730 (2002), by requiring more than "fair warning" that police officers' actions violated the Fourth Amendment in granting them qualified immunity when, according to the district court, they unnecessarily inflicted force to a civil detainee's neck who then, according to a forensic pathologist, died from asphyxiation caused by neck compression.

Whether the City of West Palm Beach has municipal liability for the failure to train police officers on the proper use of ankle hobbles, the device used to "hog-tie" the deceased civil detainee in this case.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the lower court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner : Linda Lewis

Defendants-Appellees and Respondents : City of West Palm Beach, Florida, Raymond Shaw, Robert LeRoy Root, III, Randall Maale, Thelton Luke, and Audrey Dunn

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PETITION FOR A WRIT OF CERTIORARI

Linda Lewis respectfully petitions for a Writ of Certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The published opinion of the U.S. Court of Appeals for the Eleventh Circuit, dated March 11, 2009, is officially reported at 561 F. 3d 1288 (11th Cir. 2009), and is reproduced at App. A, 1a-12a.

The opinion Granting Defendants' Motion for Summary Judgment, dated March 19, 2008, is reproduced at App. C.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on March 11, 2009. This petition is timely filed under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3 because it is filed within 90 days of the order denying the timely petition for rehearing *en banc* before the Eleventh Circuit. In addition, the petition is timely filed under Supreme Court Rule 13.5 because this Court granted petitioner's application for a sixty day extension of time, until October 5, 2009, in which to file her petition for writ of certiorari. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

For purposes of Supreme Court Rule 14.1(g)(ii), the Court of first instance had federal question jurisdiction

under 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is the Fourth Amendment to the United States Constitution, which provides in pertinent part that, "The right of the people to be secure in their persons, ..., against unreasonable . . . seizures, shall not be violated . . . ." U.S. Const., amend. 4.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

The tragic events giving rise to this case occurred on October 19, 2005, and although they were not broadcast, the events were captured on videotape by a camera crew employed by the "COPS" television program. At shortly after 1:00 that morning, concerned citizens called 911 to report that a man, later identified as petitioner's son, Donald Lewis, needed assistance. Respondent Officer Raymond Shaw, who was accompanied in his patrol car by the camera crew, was the first officer to encounter Donald Lewis. Shaw announced a "Signal 20" to the radio dispatcher, which describes a mentally disturbed citizen, and not a criminal suspect. On foot, Shaw confronted Lewis, who according to the district court, was "shirtless and apparently distraught, stumbling onto the road and attempting to flag down passing vehicles." App. C, 17a. Shaw directed Lewis to lie down on the side of the road and, breathing heavily and grunting incoherently, Lewis did so.

Intermittently obeying Shaw's directions to relax and then gesticulating wildly and thrashing on the shoulder of the road, Lewis eventually stood up and ran, with arms raised and yelling unintelligibly, while traffic stopped. Shaw attempted to pull Lewis off the roadway, and then forced him to the ground in the center of the road. Lewis ignored Shaw's requests to place Lewis' hands behind his back, but Shaw maneuvered Lewis into a prone position, placed a knee on Lewis' back, and brought Lewis' hands behind his back to apply handcuffs.

Arriving on the scene at that point, respondent Officer Robert Root then placed his knee on Lewis' upper back and neck, between Lewis' shoulder blades, while Lewis continued to groan. After one minute of maintaining Lewis in this fashion, Root retrieved a leg restraint from his patrol car while Shaw continued to hold Lewis down in a prone position. (The leg restraint is also known as an "ankle hobble"; it is a nylon strap designed to bind an arrestee's ankles tightly together. One end of the strap has a clip that allows the full length of the strap to be secured to handcuffs after the ankles are bound.) Respondent Officer Thelton Luke then arrived, and he assisted Root in binding Lewis' ankles with the restraint. Lewis continued breathing heavily and moaning. The three officers then picked up Lewis, whose wrists and ankles were bound, and carried him in the same horizontal position to a driveway. Placed face down, Lewis continued to writhe on the cement.

According to the district court,

> Then, while Officer Luke and Officer Root kept their knees on Lewis' back, Officer

> Shaw picked up Lewis' bound legs and pushed them down and forward. Lewis suddenly became silent and motionless. The officers then tied Lewis' hands and feet together behind his back in a "hogtied" position.

Id. at 19a. Respondent Sergeant Randall Maale directed officers to "hook him up," that is, to connect the loose end of the leg restraints to the handcuffs. The officers then pulled the restraints so that Lewis' hands and feet were in contact with each other behind his back. Realizing that Lewis was unconscious, Maale ordered the restraints removed. Efforts to resuscitate Lewis were unsuccessful, and he was later pronounced dead.

Relying on this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), Lewis filed the videotape at the summary judgement stage. In addition to the above facts, the videotape and accompanying audio revealed that, before any other officers arrived, Shaw applied pressure to Lewis' neck, and Lewis temporarily lost consciousness. The videotape also shows that Root placed his knee on the back of Lewis' neck, and soon thereafter Lewis yelled, "Help. Officers. Air! Help! Up! Oh God. Oh God. Oh God. You're killing me! *See* 04.48.45 (videotape counter). Later, Lewis cried, "My name is Donald Lewis and the cops are killing me." *Id.* at 04:50:01.

At the side of the road, the videotape reveals, Root, holding the loose, clipped end of the leg restraint, asked Maale, "Want me to hook it?" Maale replied, "That would be good." *Id.* at 04:51:00. Lewis repeated, "Don't kill me! *Id.* at 04:51.01. As Sergeant Maale

watched, Shaw yelled to Lewis, "Lift your feet up!" Respondent Officer Audrey Dunn then assisted Shaw, Root, and Luke by bracing Lewis' legs in the air with her leg. Then, Dunn, Root, and Luke assisted as Shaw, with intense physical effort, forced Lewis into the air and then pushed him downward, face first. *Id.* at 04:51:15-04:51-20. Lewis did not move after this point.

Petitioner's forensic expert, Dr. Michael Baden, formerly the chief medical examiner for the City of New York, concluded that the cause of Donald Lewis' death was asphyxia due to neck compression. Dr. Baden relied on the autopsy findings, and 158 autopsy photographs, revealing petechial hemorrhages in both eyes, and prominent fresh hemorrhages in the soft tissues of the larynx. Dr. Baden noted considerable damage to the front of Lewis' neck, demonstrating that "considerable pressure was put on the front and back of Mr. Lewis' neck." Evidence that neck compression caused Lewis' death included hemorrhage around the right side of the hyoid bone, a very large hemorrhage on the posterior pharyngeal muscle, extending along the right thyroid and cricoid cartilages, hemorrhages in the back of the pharynx, and hemorrhages in the back of the larynx and beneath the hyoid bone. All of these areas of hemorrhage "had to have blunt force applied, whether a blow or a squeeze that caused bleeding." The petechial hemorrhages in the Lewis' eyes were caused by pressure on the neck and chest that obstructed blood flow to Lewis head.

II. DECISION OF THE DISTRICT COURT

Relying on the videotape, the district court found that a reasonable jury could conclude that Shaw, Root, and Luke violated the Fourth Amendment. The court

held that these officers inflicted excessive force when they repeatedly placed their knees on Lewis' upper back or neck when Lewis was lying prone. For instance, even after Lewis was handcuffed and a knee on Lewis' neck and back no longer served any purpose, "Root continued to forcefully depress his knee on the back of Lewis' neck for nearly one additional minute," and "[d]uring this time, Lewis squirmed and groaned as though in pain." App. C, 24a. The court found as well that Shaw, Root and Luke placed their knees on Lewis unnecessarily. The court found that a reasonable jury could find that this technique amounted to excessive force, observing, "Here again, because Lewis' hands were cuffed behind his back and his feet already tied together, *there appears to be no reason for Officer Root and Officer Luke to employ such a painful and potentially dangerous technique*." *Id.* at 25a (emphasis added).

Likewise, the court found that a reasonable jury could conclude that Shaw violated the Fourth Amendment later during the seizure. As the district court described,

> At one particular point while Lewis was handcuffed and lying face-down, Officer Root and Officer Luke had their knees on Lewis' back. While attempting to apply the hobble to Lewis' legs, *Officer Shaw picked up Lewis' legs in an obviously unnatural and dangerous position and violently shoved them forward, placing tremendous stress on Lewis' spine and neck*. At just that moment, Lewis, who had been continuously groaning and writhing, suddenly became silent and

motionless.

Id. (emphasis added). The district court concluded that,

> [R]egardless of whether the actions of the officers caused Lewis' death, a reasonable juror could find that the officers used constitutionally excessive force under the circumstances. After Lewis was already handcuffed and effectively immobilized, there was simply no need for the officer to kneel on Lewis' upper back and neck. Nor was there a need for Officer Shaw to pick up and shove Lewis' legs down toward his awkwardly contorted body. The officers were attempting to either further restrain Lewis, or to place him in a seated position. Officer Shaw's actions, combined with Officer Root's and Officer Luke's knees on Lewis' back, did not help achieve either of these possible goals.

App. C, 29a.

Accordingly, the district court concluded that petitioner satisfied the first step of the two-part standard of *Saucier v. Katz*, 533 U.S. 194 (2001), as a reasonable jury could find a violation of the Fourth Amendment. However, the district court concluded that petitioner failed to satisfy *Saucier*'s second step, as prior authority did not clearly establish that the Fourth Amendment was violated under these facts. The district court found that the respondent officers did not have "'fair warning that their . . . .treatment of [the plaintiff] was unconstitutional.'" *Id.* at 30a,

quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002). The district court found that petitioner failed to satisfy any of the three avenues available for demonstrating that the Fourth Amendment right respondents Shaw, Root, and Luke violated was clearly established: the existence of prior caselaw finding a Fourth Amendment violated in indistinguishable factual circumstances; the existence of a prior case articulating a sufficiently broad principle of law; or a showing that the officers' conduct was "so egregiously excessive that any reasonable officer would have understood it to be unconstitutional, even in the absence of any relevant case law."*Id.* at 31a.

The district also granted the motion for summary judgment filed by the City of West Palm Beach, holding that petitioner failed to demonstrate under *City of Canton v. Harris*, 489 U.S. 378 (1989), that the City failed to train the officers adequately in the safe application of the leg restraint, so as to avoid "hogtying" arrestees which, as petitioner claimed, caused one of the Fourth Amendment violations.

III. DECISION OF THE ELEVENTH CIRCUIT

On appeal, the Eleventh Circuit affirmed the order granting summary judgment to respondents. Relying on this Court's recent opinion in *Pearson v. Callahan*, 555 U.S.___, 129 S. Ct. 808 (2009), which permits courts to begin with the second step of *Saucier*'s analysis, the Eleventh Circuit opted not to reconsider the Fourth Amendment issue. Instead, the court reasoned that, "Even if the officers' actions violated Lewis' Fourth Amendment rights, the appellant did not demonstrate that the officers' conduct was an intrusion

on a clearly established right." App. A, 6a. Observing, like the district court, that a citizen can make this showing in three possible ways, the Eleventh Circuit reasoned that case law does not provide the necessary precedent, either specifically on through broad principles, to clearly establish the Fourth Amendment rights in this case.

Thus, the Eleventh Circuit held, Lewis must demonstrate that "the officers' conduct was so egregious and unacceptable so as to have blatantly violated the Constitution . . . ." *Id.* at 7a. The court reasoned that this is a "narrow exclusion," and that a citizen must show that the officer's conduct is "'so far beyond the border between excessive and acceptable force that the official had to know he was violating the Constitutional even without case law on point.'" *Id.*, *citing Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997). The Eleventh Circuit concluded that, although the officers testified that Lewis "was not a danger to them" and that "application of the hobble may not have been entirely necessary," the respondents' conduct was "not so violent and harsh to be considered an egregious violation of a constitutional right." *Id.* at 7a-8a. Thus, the Eleventh Circuit affirmed the district court's holding that the officers were entitled to qualified immunity on *Saucier's* second step.

The Eleventh Circuit also affirmed the order granting summary judgment on the municipal policy claim. The court reasoned that, unlike appropriate training on the use of firearms, the need for training on the proper use of hobble restraints and the proper placement of weight on an arrestee's back during the restraint process was not "so obvious" that it "requires proactive training by the City to ensure avoidance of

constitutional violations." *Id.* at 9a. Thus, the court declined petitioner's offer to apply *City of Canton* to the training deficiencies petitioner relied upon for his municipal policy claim.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT DENYING QUALIFIED IMMUNITY IN INDISTINGUISHABLE CIRCUMSTANCES

This Court should grant the petition pursuant to Sup. Ct. R. 10(a) because the decision of the Eleventh Circuit conflicts with the decision of the Fifth Circuit on the same important matter.

In *Gutierrez v. City of San Antonio*, 139 F. 3d 1441 (5th Cir. 1998), the Court of Appeals for the Fifth Circuit reversed the district court's order granting summary judgment to defendant police officers raising a qualified immunity defense in indistinguishable factual circumstances. In *Gutierrez*, the family of a man who died in police custody brought a Fourth Amendment claim against police officers who hog-tied him during his detention. *Id.* at 443-44. According to the medical examiner, the cause of death was the presence of various narcotics in his system, and a contributory cause of death was that the arrestee was "hog tied" and left face down on the back seat of a police car. *Id.* at 444.

According to the *Gutierrez* court, the officers first

saw Gutierrez shirtless and "stumbling around" in an intersection. *Id.* at 442. They watched as he ran around in circles in the middle of the street and then slipping and falling on his side. *Id.* at 443. As the officers approached, Gutierrez began swinging his arms wildly and then crawling toward them on his hands and knees. *Id.* Gutierrez claimed he hand been shot, although the officers found no wounds, and then claimed that he "shot some bad coke." *Id.* Gutierrez refused to cooperate with EMS technicians, and then began to kick at the windows of a police vehicle once officers concluded that they would have to drive him to the hospital. *Id.* Consequently, the officers decided that Gutierrez must be "hog-tied." *Id.* The officers used a "leg-restraint device," described as "a nylon rope with a loop on one end and a clasp on the other ('hog-tie')." *Id.* According to the *Gutierrez* court, one officer "placed the loop around Gutierrez's feet, and [another officer] linked the clasp around the handcuffs, drawing Gutierrez's legs backward at a 90 degree angle in an 'L' shape, thereby 'hog-tying' him." *Id.* (In this case, respondents bound Lewis' legs and hands so that they were in contact with each other, and thus his legs were pulled up in a far more acute angle than 90 degrees.)

The Fifth Circuit concluded that the Fourth Amendment right Gutierrez's survivors claimed was clearly established in those circumstances, and accordingly reversed the district court's order granting the officers qualified immunity. *Id.* at 446-47. The Fifth Circuit first rejected the officers' argument that the right to be free from hog-tying was not clearly established because neither this Court nor any circuit had specifically found that hog-tying constituted

excessive force. *Id.* at 445. A reasonable police officer, the *Gutierrez* court reasoned, would have known that pre-existing law established that "hog-tying falls within the bounds of the Fourth Amendment's prohibition of the use of excessive force . . . ." *Id.* at 446. The Fifth Circuit reasoned that this Court, in *Tennessee v. Garner*, 471 U.S. 1 (1985), held that the use of deadly force on an arrestee who posed no threat of serious physical harm violated the Fourth Amendment. *Id.* Deadly force is that degree of force that would create a substantial risk of death or serious bodily injury. *Id.* The court found that the plaintiff demonstrated that hog-tying in these circumstances would constitute deadly force, and thus violate clearly established law. *Id.* at 446-47. The *Gutierrez* court acknowledged that a broadly disseminated study of deaths in police custody revealed a syndrome known as Sudden Custody Death Syndrome, caused by "(1) drug use, (2) positional asphyxia, (3) cocaine psychosis, and (4) hog-tying or carotid choke holds." *Id.* at 446. Finding that the officers were not entitled to qualified immunity, the *Gutierrez* court relied in part on the fact that the officers' police agency had prohibited hog-tying. *Id.* at 449. Likewise, as the Eleventh Circuit's opinion in this case explicitly observed, the police department's training officer emphasized in his deposition testimony that "it is department policy not to hogtie arrestees." App. A, 11a.

Accordingly, this Court should grant the petition to resolve this conflict between the Fifth Circuit's opinion in *Gutierrez* and the Eleventh Circuit's opinion in this case.

II THE ELEVENTH CIRCUIT'S JUDGMENT CONFLICTS WITH THIS COURT'S "FAIR WARNING" STANDARD ESTABLISHED IN *HOPE V. PELZER*, 536 U.S. 730 (2002)

This Court should also grant this petition pursuant to Sup. Ct. R. 10(c), as the Eleventh Circuit's opinion conflicts with this Court's decision in *Hope v. Pelzer*, 536 U.S. 730 (2002). In *Hope*, this Court reversed the Eleventh Circuit on the basis that its qualified immunity analysis required an impermissibly specific degree of factual similarity of previously decided cases before holding that the law was clearly established for qualified immunity purposes. In *Hope*, this Court concluded that the Eleventh Circuit should have found that its own precedents clearly established that reasonable prison guards would know that handcuffing convicted prisoners to a hitching post violated the Eighth Amendment. *Id.* at 747-48.

In *Hope*, the Eleventh Circuit concluded that such a technique violated the Eighth Amendment. *Id.* at 736. However, the Eleventh Circuit nonetheless found that prison guards were entitled to qualified immunity because no cases that were "preexisting, obvious and mandatory" were "materially similar" to the facts of *Hope*, and affirmed the order granting summary judgment on the guards' qualified immunity defense. *Id.* at 736.

Initially, this Court found that the facts at the summary judgment stage demonstrated that the Eighth Amendment violation is obvious. *Id.* at 738. As punishment for disobeying guards at a chain gang's

worksite, Hope was transported back to the prison, shackled in leg irons, and handcuffed to a hitching post for 7 hours with water provided only once or twice. *Id.* at 734-35. This Court found that such an "'unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Id.* at 737. However, this Court then found that the Eleventh Circuit's requirement of the existence of "materially similar" precedent "is not consistent with our cases." *Id.* at 739.

Instead, the *Hope* Court confirmed that officers are entitled to a "fair warning" that their conduct violates the Constitution. *Id.* at 739-40, *citing United States v. Lanier*, 520 U.S. 259 (1997). According to *Hope*, "our opinion in *Lanier* thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. This Court explicitly rejected the requirement that only a "fundamentally similar" or "materially similar" case can clearly establish the law. *Id.* Under *Lanier* and *Hope*, "the salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the incident] gave respondents fair warning that their alleged treatment of Hope was unconstitutional." *Id.* As this Court reasoned, "The use of the hitching post as alleged by Hope "'unnecessar[ily] and wanton[ly] inflicted pain,' and thus was a clear violation of the Eighth Amendment. Arguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Eighth Amendment." *Id.* (quotations and citations omitted).

In addition, this Court readily concluded that the Eleventh Circuit's own precedent clearly established that the prison guards' conduct violated Hope's constitutional rights. *Id.* at 742. This Court found, for instance, that the Eleventh Circuit's opinion in *Ort v. White*, 813 F. 2d 318 (11th Cir. 1987), provided fair warning to the respondent guards that their conduct was unconstitutional. The *Ort* court held that an officer's temporary denial of water, done in an effort to coerce an inmate to comply with the rules of a prison work squad, did not violate the Constitution. *Id.* at 743, *citing Ort*, 813 F. 3d at 325. However, the *Hope* Court observed that the *Ort* opinion also acknowledged that, had the officers later denied the inmate water at the prison as punishment for violating the rules, or placed the inmate's health at risk, they would have violated the Constitution. *Id.* Thus, this Court reasoned, the premise of *Ort* - that the Eighth Amendment is violated by physical abuse of an inmate after he terminates his resistence to authority - but not necessarily the facts of *Ort*, provided fair warning to the guards in *Hope* that their conduct was unconstitutional. *Id.*

As the Eleventh Circuit failed to apply the "fair warning" standard in *Hope*, so too did the Eleventh Circuit require more than "fair warning" in this case. The district court held that, because Lewis "was already handcuffed and effectively immobilized," App. C, 29a, there was no need for officers "to kneel on Lewis' upper back and neck" and no need for an officer "to pick up and shove Lewis' legs down toward his awkwardly contorted body." App. C, 29a. These actions violated the Fourth Amendment, the district

court held, because they did nothing to achieve the officers' ostensible goals of restraining Lewis or placing him in a seated position. *Id.*

As in *Hope*, the Eleventh Circuit overlooked its ample precedent, in the context of Fourth Amendment excessive force cases, that established the principle that force is unconstitutional when it is unnecessarily applied after an arrestee is secured in handcuffs. Such force is even less justifiable in this case, as Lewis was civilly detained as a "Signal 20," or mentally disturbed person, and not arrested as a criminal, and because the force used was especially severe. Again, according to Dr. Baden, Lewis died of a neck compression that created large areas of hemorrhage around his neck and in his eyes.

Lewis relied on a line of Eleventh Circuit cases that denied qualified immunity in cases involving the unnecessary application of force during Fourth Amendment seizures. In *Lee v. Ferraro*, 284 F. 3d 1188 (11th Cir. 2002), the court denied qualified immunity to an officer who slammed an arrestee's head against the hood of her car "*after* she was arrested and secured in handcuffs." *Id.* at 1198 (emphasis in original). In *Mercado v. City of Orlando*, 407 F. 3d 1152 (11th Cir. 2005), the court denied qualified immunity to an officer who used force, indeed deadly force, against a non-resisting, non-threatening mentally ill person because it was unnecessary to any legitimate law enforcement purpose. *Id.* at 1157, 1160. *See also Smith v. Mattox*, 127 F. 3d 1416, 1419-20 (11th Cir. 1997)(denying qualified immunity to officer who broke arrestee's arm with a blow while handcuffing him); *Hadley v.*

Gutierrez, 526 F. 3d 1324, 1330 (11th Cir. 2008)(in context of a 2002 seizure, denying qualified immunity to an officer who gratuitously used force on a handcuffed, non-resisting prisoner); *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008)(same holding in context of 2003 seizure).

In summary, the Eleventh Circuit's opinion in this case conflicts with the holding of *Hope*, as the Eleventh Circuit's own precedents provided fair warning to the respondent officers in this case that the severe force used in civilly detaining Donald Lewis was, as the district court found, unnecessary and gratuitous.

III. THE ELEVENTH CIRCUIT'S JUDGMENT CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT REGARDING MUNICIPAL LIABILITY FOR THE FAILURE TO TRAIN OFFICERS ON THE SAFE APPLICATION OF ANKLE HOBBLES

This Court should grant the petition pursuant to Sup. Ct. R. 10(a), as the Eleventh Circuit has entered a decision in conflict with a decision of the Tenth Circuit on the same important matter. In this case, the Eleventh Circuit concluded both that the respondents' use of the hobble restraint did not violate the Fourth Amendment, and assuming it did, the City of West Palm Beach would not be liable for the failure to train its officers on the safe application of the device.

These holdings conflict with the opinion by the Court of Appeals for the Tenth Circuit in *Cruz v. City of Laramie*, 239 F. 3d 1182 (10th Cir. 2001). First, the

Cruz court held that, given the known dangers posed by this restraint, the use of hog-tie on an arrestee with "diminished capacity" constitutes constitutionally excessive force. *Id.* at 1188-89. *Cruz* also applied the failure-to-train principle of municipal liability established in *City of Canton v. Harris*, 489 U.S. 378 (1989) to the use of ankle hobbles to hog-tie arrestees. The *Cruz* Court relied on the fact that the district court

> cited evidence that the City failed to train it's officers on the use of hobble restraints and that the City put such restraints in its police cars. The Court also noted that high ranking officials were aware of positional asphyxia attributable to hobble restraints and of a doctor's report stating that "deaths in police custody with hog-tie restraints have been reported in medical literature a number of times."

Id. at 1191, *quoting* district court.

Accordingly, this Court should grant the petition to resolve the conflict between the Eleventh and Tenth Circuits on this issue.

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

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